



Legal Update

April 2017

The SJC holds that swallowing drugs in the presence of a police officer is not a violation of G. L. c. 268, § 13B because it does not constitute misleading a police officer!

Issue: Does the nonverbal conduct, of swallowing drugs, qualify as “misleading,” in the context of G. L. c. 268, § 13B?

Holding: The SJC concluded that misleading conduct in this context is conduct that is (1) intended to create a false impression and (2) reasonably likely to send investigators astray or in the wrong direction.

Commonwealth v. Tejada, SJC-12187 (April 20, 2017): A Boston police officer approached the defendant, Josefa Tejada, and a male whom the officer had observed earlier trying to purchase heroin with food stamps. The two made eye contact with the officer and began to walk away. A third person, a known heroin user, was squatting behind an automobile where the other two had been standing. The officer ordered the man behind the car to reveal what he was holding. When the man refused, the officer grabbed his arm, causing a small plastic bag of a light brown powdery substance to fall from his hand to the ground. As the officer began to take the man into custody, he observed the defendant return to the scene, pick up the plastic bag and place it in her mouth. The bag and its contents were not recovered.

The defendant was charged with misleading a police officer pursuant to G.L. c. 268, § 13B, and she filed a motion to dismiss, which the trial court allowed. The Appeals Court reversed. The SJC heard the case on further appellate review to consider the meaning of “misleads,” pursuant to G.L. c. 268, § 13B.

Conclusion: The SJC held that the defendant's actions were not “misleading” within the meaning of the G.L. c. 268, § 13B. The SJC concluded that §13B focuses on misleading conduct that is intended to create a false impression and reasonably likely to send investigators astray or in the wrong direction. Although there was probable cause to believe that the defendant intended to “impede, obstruct or otherwise interfere” with a criminal investigation, there was insufficient evidence that the defendant’s conduct was “willfully misleading” under § 13B and therefore the Court affirmed the allowance of the motion to dismiss.

What is considered misleading conduct under § 13B?

The SJC reviewed the definition of “misleading conduct” contained in the Federal witness tampering statute, which defines misleads in the context of making a false statement or false impressions. 18 U.S.C. § 1515(a)(3).

First, the SJC considered *Commonwealth v. Paquette*, 475 Mass. 793, 799-800 (2016), where the SJC defined the term “misleads” in the context of false statements to be a knowing or an intentional act calculated to lead another person astray. “It follows that for any conduct to be considered misleading under § 13B, the conduct must be calculated to create in another a false impression or a belief that is untrue.” Additionally, the definition for “misleads” can be expanded to include leading someone on a “wild goose chase,” or leading police astray during an investigation.

Here, the SJC had to determine whether the defendant’s nonverbal conduct of swallowing the drugs in front of the police officer was intended to mislead or lead the investigation in a materially different, or wrong, direction. Although the defendant’s swallowing of the plastic bag in full view of a police officer may have been an attempt to keep potential evidence away from the officer, it was not an attempt to create a false impression within that officer. The SJC reasoned that the defendant did not attempt to, nor did she, deceive the officer as to where the bag went.

Second, the defendant's conduct did not lead officers astray or send them on a "wild goose chase,” either because the officers knew exactly where to find the plastic bag. The SJC concluded that its interpretation of “misleads” within § 13B requires that both an intent to mislead and an intent to impede, are necessary to obstruct, delay, harm, punish, or otherwise interfere with a criminal investigation.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department’s legal advisor or prosecutor.